and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone."

Next, on the main question of infringement of the plaintiffs' registered Trade Mark, for the reasons I have already given, I can be brief. On the evidence I found that the three Chinese characters are not the essential features of the mark of the plaintiffs. It is not them that identify the drinks of the plaintiffs. What is distinctive of the plaintiffs' registered Trade Mark are the device of the red "lion" and the name of the plaintiffs which came to be denoted on the bottles and crown corks of the plaintiffs in the abbreviated form F & N. In my judgment, the advertisements of the defendants were not likely to deceive anyone to believe that "Mirinda Sarsi" offered by the defendants was F & N sarsi made by the plaintiffs.

Finally, I want to say a few words on the phonetic Romanised rendering of the Chinese characters "sarsi" or "Sar See Swee". Neither of them is incorporated in the registered Trade Mark of the plaintiffs. I am therefore of the view that the plaintiffs cannot object to the defendants or anybody else using either "sarsi" or "Sar See Swee".

For all these reasons I dismissed the claim of the plaintiffs. I granted the defendants the order as claimed in the counterclaim that the Register of Trade Marks be rectified by an entry of disclaimer of the three Chinese characters in respect of Trade Mark No. 4551. The interim injunction granted on April 13, 1978 was discharged, and I directed the Registrar to assess damages pursuant to the undertaking given by the plaintiffs on the said interim injunction. Costs were given to the defendants.

Claim dismissed;
Counterclaim allowed.

Solicitors: *C.S. Tay & Co.; Karthigesu & Arul.*

MALAYSIAN REPORTS

KAMARUDDIN BIN MOHAMED v. UNITED MOTOR WORKS (M) SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Abdul Hamid F.JJ.) February 3 & May 15, 1980]

[Johore Bahru — Federal Court Civil Appeal No. 186 of 1978]

Bankruptcy — Service of bankruptcy notice — Substituted service — Notice brought to knowledge of debtor — Act of bankruptcy — Petition presented by corporation — Whether officer authorised — Compliance with forms — Bankruptcy Rules, 1969, rules 95, 97, 109-113, 215 and forms — Bankruptcy Act, 1967, ss. 3, 105 & 133.

In this case the appellant appealed against the decision of the High Court dismissing a motion for the bankruptcy notice and bankruptcy petition to be set aside. On appeal it was contended —

(a) there was no proper service of the Bankruptcy Notice on the appellant;

(b) the Petition presented by the respondent was signed on its behalf by an officer not duly authorised for that purpose; and

(c) there was no act of bankruptcy committed within the last six months before the presentation of the Bankruptcy Petition.

Held: (1) in this case there was a failure to effect the posting within the time prescribed in respect of one of the three modes of substituted service ordered. The order to post on the notice board at the High Court in Kuala Lumpur and to advertise in the *Straits Times* and *Berita Harian* had been complied with but not the posting at the judgment debtor's premises. The appellant admitted that the bankruptcy notice was brought to his knowledge and, as the object of substituted service was to bring the bankruptcy notice to the knowledge of the debtor, if this were achieved the service must be deemed to be good and sufficient;

(2) in this case the debtor had not complied with the bankruptcy notice and therefore there was an act of bankruptcy on which the petition could be grounded;

(3) there is no strict requirement that the forms given or recommended in *Atkin's Forms* must be rigidly followed;

(4) the Credit Manager in this case had authority to institute the bankruptcy proceedings on behalf of the respondents;

(5) in this case the appellant had not paid his debts and the other grounds on which he relied were not proved to the satisfaction of the court and therefore there were no grounds to warrant an annulment of the adjudication order.

Cases referred to:-

(1) *Re a Judgment Debtor* [1937] 1 Ch. 137, 145.
(2) *Porter* v. *Freudenberg* [1915] 1 K.B. 857, 889.
(3) *Au-Yong* v. *Dicum & Anor.* [1963] M.L.J. 349.
(4) *P.T. Pelajaran Nasional Indonesia* v. *Joo Seang & Co. Ltd.* [1958] M.L.J. 113.
(5) *Re a Debtor No. 21 of 1950, Ex parte the Debtor* v. *Bowmaker Ltd. & Anor.* [1951] 1 Ch. 313; 318.

FEDERAL COURT.

Vincent Lai for the appellant.

V.C. George for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appeal is against the decision of Anuar J. in the High Court at Johore Bahru dismissing a motion by the appellant asking, *inter alia,* that the Bankruptcy Notice dated July 23, 1976 and Bankruptcy Petition dated January 20, 1977 be set aside.

There are several grounds of appeal. It is contended that —

(a) there was no proper service of bankruptcy notice on the appellant;

(b) the petition presented by the respondent was signed on its behalf by an officer not duly authorised for that purpose; and

(c) there was no act of bankruptcy committed within the last six months before the presentation of the bankruptcy petition.

Briefly the facts are that the respondents obtained a final judgment on February 2, 1976 for a sum of $6,844.15 with interest at the rate of 6% per annum on the judgment amount and cost. The judgment debt was not satisfied and execution thereon had not been stayed. Bankruptcy notice was issued on July 23. Time for service was extended for one month by court order of September 9, for effective service to be made on or before October 10. By affidavit of posting dated November 4, it is disclosed that posting of copies of bankruptcy notice and a copy of the order on the notice board of the High Court at Kuala Lumpur was effected on September 20. The affidavit of service of advertisement disclosed that the bankruptcy notice was sent for publication on October 1, and duly published in the *New Straits Times* and *Berita Harian* on October 4. The order for substituted service also directed that a copy of the bankruptcy notice and the order be posted on a conspicuous part of the judgment debtor's premises known as 4th Floor MARA Building, Johor Bahru.

The posting on the judgment debtor's premises was not effected until October 20, ten days after the expiry of the extension period. However, the appellant did not raise it as a ground to support his application to set aside the bankruptcy notice and the motion to annul the adjudication order. It is raised for the first time in this court.

On the question of service of bankruptcy notice rule 97 of the Bankruptcy Rules, 1969 provides that —

"a Bankruptcy Notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition."

Rules 109 to 113 relate to service of creditor's petition. Rule 109 provides for personal service and where personal service is not possible substituted service is provided for under rule 110 as follows —

"(1) If the court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause, it may order substituted service to be effected in such a manner as it thinks fit.

(2) Where any such order has been carried out, the petition shall be deemed to have been duly served on the debtor."

The appellant contended that the affidavit supporting the respondents' application for substituted service was insufficient to secure the order sought. I think the proper time for the appellant to raise this was at the hearing before Harun J. on an application to set aside the bankruptcy notice but he did not do so. I do not see any reason why it should be considered now. In any event, there is no merit whatever in the appellant's contention. The learned judge was satisfied that there was sufficient ground to order substituted service. The decision was never challenged. There were two parts of the order, first, an extension of time of service of the bankruptcy notice for one month to be effected on or before October 10; second, the mode of substituted service. It is in evidence that the order to post on the Notice Board at the High Court at Kuala Lumpur and to advertise in the *New Straits Times* and *Berita Harian* had been complied with within the time extended except the posting on the judgment debtor's premises.

The question that calls for determination is whether the failure to effect the posting within the time prescribed in respect of one of the three modes ordered had rendered the whole of the substituted service void and of no effect.

It is abundantly clear that the bankruptcy notice was brought to the knowledge of the appellant as is revealed from the appellant's own admission in the affidavit affirmed on October 6, 1976. This fact confirmed that there was effective service upon the appellant. A breach of any further direction or term in the order designed to achieve the same could not in the circumstances be said to have occasioned substantial failure of justice. Such a breach could not therefore be regarded as an illegality but a mere irregularity which was curable.

Fundamentally the object of the substituted service was to bring the bankruptcy notice to the knowledge of the appellant and if that was achieved the service must be deemed to be good and sufficient. Slesser L.J. in his judgment in the case of *Re a Judgment Debtor*[1] quoted the *dictum* of Lord Reading in *Porter* v. *Freudenberg*[2] on a substituted service as follows —

"'Lord Reading laid down in general terms what are the considerations which should move a Judge in Chambers before him an application is made for substituted service . . .' first '. . . .'

next, 'to satisfy himself for the same reason that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant.'"

(See also: *Re Au Yong* v. *Dicum & Anor.)*[3]

Mr. Vincent Lai, counsel for the appellant referred to *P.T. Pelajaran Nasional Indonesia* v. *Joo Seang & Co. Ltd.*[4] and in *Re a Debtor No. 21 of 1950, Ex parte the Debtor* v. *Bowmaker Ltd. & Anor. (No. 1).*[5]

In my view these cases could not apply to the present case. The former relates to a judgment obtained by a company in default of appearance by the defendant where the defendant company had not been served with the writ of summons. In the latter case it relates to a question of content and substance of a bankruptcy notice. In the case under consideration the question of validity of the bankruptcy notice or its content is not in issue.

I shall now proceed to deal with the appellant's contention that there was no act of bankruptcy to support the presentation of the bankruptcy petition. In law a bankruptcy is committed by a debtor if he has not complied with a bankruptcy notice duly served in

circumstances provided by section 3(1)(i) of the Bankruptcy Act, 1967 (hereinafter called the Act). In the present case both the posting on the Notice Board of the High Court in Kuala Lumpur and the advertisements in the *New Straits Times* and *Berita Harian* were effected within the extended period. The appellant applied to set aside the bankruptcy notice on October 6, 1976 also within the extended period. The application eventually came up for hearing before Harun J. at Kuala Lumpur on January 3, 1977 and was dismissed.

In dismissing the application both the appellant's affidavit of October 6 and the respondents' affidavit affirmed by Wong Kong Chung, the Credit Manager authorised by the respondents were considered. The effect of the hearing and determination of the application was that an act of bankruptcy had been deemed to have been committed under the notice (rule 95(2) Bankruptcy Rules). Evidently the court was satisfied that the respondents had obtained a final judgment and the judgment debt had remained unsatisfied. It is also evident that execution thereon had not been stayed and the appellant had not complied with the requirement of the bankruptcy notice. If that be the case the bankruptcy petition presented on January 20, 1977 must be held to have been properly presented against the appellant in accordance with section 5 of the Bankruptcy Act. In that case an act of bankruptcy on which the petition was grounded had occurred within six months before the presentation of the petition.

I now come to the other ground of appeal. The appellants contended that there was a failure by the respondents to comply with section 133(a) of the Act which reads as follows —

"133. For all or any of the purposes of the Act —

(a) a corporation may act by any of its officers authorised in that behalf under the seal of the corporation,"

Section 133(a) should be read with rule 215 of the Bankruptcy Rule which states that —

"Where corporation presents a petition or taken any other action under this Act, the officer of the corporation may act in his own name stating that he is such an officer duly authorised under the seal; but a petition may be presented by the corporation and signed by the officer on its behalf. Any person chosen by the corporation to act as its agent is an officer within section 133 and if duly authorised under seal can act for the corporation."

In the course of submission by counsel for the appellant the attention of this court was drawn to certain forms as set out in Lord Atkin's Court Forms Vol. 7 at pages 230 and 233, Forms 83, 87 and 88. It needs no emphasis that they are recognised but it should be observed that proforma of forms to be used in bankruptcy proceedings is given in the appendix to the Bankruptcy Rules 1969 and be that as it may these forms are intended to be used with modifications as may be necessary. There is clearly no strict requirement that *Atkin's* forms must be rigidly followed.

I now turn to the final ground of appeal. Substantially it is appellant's contention that the Credit Manager did not have the required authority to institute the bankruptcy proceedings on behalf of the respondents in compliance with section 5 of the Act.

I reiterate that Anuar J. dismissed the objection when the same was raised before him at the hearing of the application to set aside the bankruptcy petition. There was clear evidence that Wong Kong Chung, Credit Manager of the respondents was authorised under seal of the corporation on February 3, 1976 and by that authority he was authorised to act or take action for all or any of the purposes of the Act, i.e. in respect of any process or proceeding thereunder. In accordance with such authority he presented the petition in the name of the corporation. It may well be that when he described himself an attorney he was not really giving an accurate description, nevertheless he did have the required authority. The error there was, to my mind, essentially as to form and, would only have amounted to an irregularity insufficient to warrant the proceeding to be invalidated. (See section 131 of the Act.) I would also stress that there was no question of any misrepresentation on the face of the petition. On consideration this court is satisfied that section 133(a) of the Act had been fully complied with.

It may be pertinent at this point to make an observation regarding the power to annul an adjudication order. The law is clear in that the power is discretionary. If the court was of the opinion that the appellant ought not to have been adjudged a bankrupt or where it was proved to the satisfaction of the court that the appellant had paid the judgment debt in full the court was entitled to annul the adjudication order (see section 105 of the Act). In the instant case, the appellant had not paid his debt and the other grounds on which he was relying had not been established to the satisfaction of the court to warrant an annulment of the adjudication order.

The learned judge who heard the motion found that it lacked merit and therefore dismissed it. This court sees no reason to interfere with such finding and would accordingly dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *John Ang & Co.; Ng Ek Teong & Partners.*

KOW NAN SENG v. NAGAMAH & ORS.

[F.C. (Lee Hun Hoe C.J. Borneo, Wan Suleiman & Salleh Abas F.JJ.) July 7 & September 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 169 of 1979]

Torts — Negligence — Person injured in road accident — Injuries sustained were minor fractures — Application of complete plaster cast — Lack of proper skill in application of treatment and lack of observation in monitoring response to treatment — Inadequate blood circulation leading to gangrene and amputation of leg — Liability of medical officer and Government for damages — Medical negligence.

Damages — Leg-amputation — General damages $37,500 awarded.

In this case one Arasappa, the 2nd respondent, was injured in a road accident between a motor cycle ridden by him and a motor car driven by the appellant. He sustained minor fractures and was taken to hospital where he was attended by a medical officer, the 3rd respondent. A complete plaster cast was applied to the leg but owing to lack of proper skill in the application and observation in monitoring